THE

ONTARIO WEEKLY REPORTER.

(TO AND INCLUDING DECEMBER 20TH, 1902.)

VOL. I. TORONTO, DECEMBER 25, 1902. NO. 44

DECEMBER 12TH, 1902.

DIVISIONAL COURT.

MONRO v. TORONTO R. W. CO.

Appeal from Ruling of Master in Ordinary—Forum—Weekly Court —Reference, Stay of, pending Appeal from Judgment of Referee.

Appeal by defendants from an order of STREET, J., in Court, dismissing an appeal by defendants from a certificate of the Master in Ordinary, upon the ground that such an appeal does not lie to a single Judge, but to a Divisional Court; and, in the alternative, appeal by defendants from the certificate of the Master, which was to the effect that he had ruled that the reference in this action should proceed, notwithstanding a pending appeal to the Court of Appeal from the judgment directing the reference.

J. Bicknell, for defendants, contended that the matter in question was one of practice within the meaning of sec. 75 of the Judicature Act, and therefore an appeal lay to a Judge; and that by Rules 827 and 829 the practice now was that the reference was stayed upon security being given on appeal.

W. N. Ferguson, for plaintiff, contra.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J.) was delivered by

MEREDITH, C.J.—The appeal from the ruling of the Master in Ordinary was properly brought before a Judge in the Weekly Court. The question raised was one of practice, and

the statute (R. S. O. ch. 51, sec. 75 (2)) requiring appeals from decisions of the Master in Ordinary to be taken to a Divisional Court, therefore, did not apply.

As to the substance of the appeal, the fact that the defendants were by the judgment directing the reference, ordered, upon partition being made, to convey to the plaintiff the lands allotted to him in severalty, did not bring the case within the exception contained in Rule 827 (2) (*b*), (*c*), since the defendants could not deposit the deed or give possession until after the proceedings in the action were practically at an end.

No inconvenience would result from this construction of clauses (*b*) and (*c*), for in a proper case it would always be open to the respondent under sub-sec. 2 to get an order imposing upon the appellant such terms as might be reasonable to prevent any injury being done to the respondent by the failure of the appellant to conform to the terms of the judgment as to the execution of the conveyance or the delivery of possession in the event of the judgment being affirmed.

Appeal allowed. Costs in the reference.

DECEMBER 15TH, 1902.

DIVISIONAL COURT.

HOLMES v. TOWN OF GODERICH.

Municipal Corporation — Ordinary Current Expenditure — Right of Corporation to Borrow Money to Use as Security on Appeal —Costs—Appeal for—Status of Plaintiff.

Appeal by plaintiff from judgment of ROBERTSON, J. (ante 367), dismissing the action, which was brought by plaintiff, on behalf of himself and all ratepayers of the town of Goderich, to restrain the defendant corporation, their mayor and treasurer, and the Bank of Montreal, from discounting or in any way dealing with a promissory note (or the proceeds thereof) made to the bank to provide funds to pay into Court $2,000 as security on an appeal to the Supreme Court of Canada by the town corporation in another action brought against them by the same plaintiff. During the course of the present action the money was paid into Court, and the Supreme Court heard the appeal and allowed it with costs, whereupon the $2,000 security was taken out

and repaid to the bank. The only question on this appeal was, therefore, as to the costs of this action.

W. Proudfoot, K.C., for plaintiff.

E. L. Dickinson, Goderich, for defendants other than the bank.

The judgment of the Court (FALCONBRIDGE, C.J., STREET, J.), was delivered by

STREET, J.:—The Court is bound to hear and decide the merits of the appeal: Fleming v. City of Toronto, 19 A. R. 318. The plaintiff's personal interest is not a bar to his bringing the action.

On the merits, the town had no power to procure the loan, for two reasons. First, because, looking at sub-sec. 4 of sec. 435 of the Municipal Act, R. S. O. ch. 223, it is clear that in order to ascertain the amount which a municipality may borrow for current expenses under that section, the amount of taxes collected for school purposes in the previous year must be deducted from the whole sum collected, and eighty per cent. of the difference only borrowed. Since the town had in 1900 only collected $21,774, deducting school rates, they could in 1901 only borrow for current expenses $17,419, and since, before this loan was made, they had already borrowed $17,000, this loan caused the legal limit to be exceeded. Secondly, because the borrowing power under sec. 435 (3) is limited to what is required for the ordinary expenses of the municipality, and an outlay which had not been contemplated when the estimates were prepared, and for which no provision, either special or as a possible contingency, had been made in the estimates, could not possibly be deemed part of the "ordinary expenditure" for the year.

Appeal allowed. Costs of action and appeal against defendants other than the Bank of Montreal.

DECEMBER 15TH, 1902.

DIVISIONAL COURT.

PRITCHARD v. FICK.

Contract—Construction—Evidence to Aid—Reformation after Breach.

Appeal by defendant from judgment of STREET, J., at trial at Brantford without a jury, in favour of the plaintiffs for $684 and costs. The action was brought for damages for non-performance of an agreement by defendant to supply plaintiffs in 1900 with 500 barrels of apples, of which only 196 barrels were delivered. The defendant set up an agree-

ment, made in February, 1901, reciting the previous agreement and default, whereby defendant agreed, in satisfaction of all plaintiffs' claims, to supply them in the autumn of that year with 350 barrels, and in which it was stated that defendant handed over his note for $100 as a guarantee for the faithful performance of this agreement, and in case of his default the plaintiffs were "to realize the said note for the amount of the same as liquidated damages for such default." The defendant had not delivered the 350 barrels as agreed; the plaintiffs had collected the amount of the note; and defendant now contended that this satisfied all the damages to which they were entitled. The plaintiffs asked reformation of the instrument, if it did not express the true agreement that they were not excluded from their remedy in damages on the first contract. The trial Judge held that it did not do so, and gave judgment for plaintiffs for $2.25 per barrel for 304 barrels, $684 in all.

H. D. Gamble, for defendant, appellant.

W. S. Brewster, K.C., for plaintiffs.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.), was delivered by

MEREDITH, C.J.:—It is abundantly clear that the agreement given effect to by the trial Judge was the agreement intended to be entered into by the parties; and if evidence of the correspondence and transactions leading up to it was not admissible to construe the writing, it was admissible for the purpose of reforming it, and it should be reformed. An instrument may be reformed after breach: see Wood v. Dwarris, 11 Exch. 493; Perez v. Oleaga, ib. 506; Olley v. Fisher, 34 Ch. D. 367; Carroll v. Erie County Natural Gas Co., 29 S. C. R. 591. In any event the judgment was right on the proper interpretation of the second agreement as it stood.

Appeal dismissed with costs.

WINCHESTER, MASTER. DECEMBER 17TH, 1902.

CHAMBERS.

HALLIDAY v. RUTHERFORD.

Administration—Claims of Creditors—Promissory Note — Interest — Corroboration—Open Account — Statute of Limitations — Work and Labour—Release of Claim.

Claims of creditors against the estate of Isaac Rutherford, deceased, were sent in under order of 30th October, 1902,

whereby a lis pendens on property conveyed by the deceased to his wife, the defendant, in his lifetime, was vacated, on the defendant, as administratrix, paying $300 into Court to abide further order.

F. C. Cooke, for plaintiff.

John MacGregor, for defendant.

THE MASTER:—The claim of the Snowball Waggon Company was admitted.

The plaintiff's claim was for the price of goods sold and delivered and on a promissory note. Only the latter claim was proved, and there was no sufficient corroboration of the claim for interest. Claim allowed at $96.29 with costs of action on County Court scale.

Geralamy's claim was for $115, of which $80 was on a balance of account, $32 on two promissory notes, and $3.20 interest on the latter. Only $1.50 of the open account was not barred by the Statute of Limitations. The running of the time under the statute was not stopped by the delivery of certain shingles by deceased to the creditor, since there had been no appropriation by the debtor to this account: Ball v. Parker, 1 A. R. 593; Friend v. Young, [1897] 2 Ch. 421, at pp. 432 et seq. Claim allowed at $36.92 and witness fees.

Sutcliffe's claim was for building a house for the intestate. The claimant's acts, subsequent to the death of the intestate, had had the effect of releasing the estate, the present defendant having assumed the liability in her individual capacity. Claim dismissed with costs.

BOYD, C. DECEMBER 18TH, 1902.

CHAMBERS.

RE NORRIS.

RE DROPE.

Lunatic — Committee — Funds in Hands of — Payment into Court — Reference—Report of Master—Revision of Costs.

Motions to confirm reports of local Masters at Goderich and Cobourg, respectively, settling schemes for the management of the estates of two lunatics.

C. Swabey and W. F. Kerr, Cobourg, for the respective applicants.

BOYD, C.:—The control of the funds is by the reports left in the hands of the committees. This is in contravention of the settled policy of the Court, and at variance with the usual form of order directing the committee to account yearly for his dealings with the estate, and to pay into Court the balance found in his hands. Injury has in past time resulted from the careless handling of funds by guardians, trustees, and committees, and, though it may seem that greater returns can be had by leaving the investments to be made by such persons, yet, owing to the expense of procuring loans, examining titles, and passing securities, there is no such preponderance of advantage as to countervail the absolute security of the fund when in the hands of the Court. In the case of small estates, which might be barely sufficient, or perhaps insufficient to yield a yearly return for the lunatic's maintenance, and in which it is necessary to collect the personalty and sell the realty, the rule which should be observed by the local officers is that the fund, when realized, shall be paid into Court. Where part of the estate is left for the abode of the lunatic or otherwise, the scheme for dealing with this should be reported to the Court, so that proper directions may be given. In all lunacy matters it is imperative that the costs should be revised under Con. Rule 1167, before the amount is inserted in the report. Direction that in these cases the moneys in the hands of the committees, and to be collected from debtors or from the sale of lands, be forthwith paid into Court. The official guardian to intervene in the usual way.

WINCHESTER, MASTER. DECEMBER 19TH, 1902.

CHAMBERS.

ANDERSON PRODUCE CO. v. NESBITT.

Foreign Judgment—Action on—Pleading—Defence on Merits.

Motion by plaintiffs to strike out paragraphs of statement of defence setting up a defence upon the merits to an action on a foreign judgment.

D. W. Saunders, for plaintiffs.

W. B. Northup, K.C., for defendant.

THE MASTER held that, on the authority of Hollender v. Ffoulkes, 26 O. R. 61, in which a Divisional Court refused to follow Woodruff v. McLennan, 14 A. R. 242, and permitted a defence upon the merits to be set up, the application must be refused.